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## Negotiable Instruments (U.C.C. Articles 3 & 4)

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# Negotiable Instruments (U.C.C. Articles 3 & 4): 1993 Leading Cases and Significant Developments in Florida Law

Rex Golden\*

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## I. INTRODUCTION

Effective January 1, 1993, the Florida Legislature revised the law in Florida relating to negotiable instruments by replacing former Florida Statutes, chapter 673,<sup>1</sup> with a new chapter 673 of the Florida Statutes,

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1. FLA. STAT. §§ 673.101-673.805 (1991) (formerly entitled "Uniform Commercial Code: Commercial Paper") (generally referred to as the "former" law).

entitled "Negotiable Instruments."<sup>2</sup> Revised chapter 673 incorporates revised Article 3 of the Uniform Commercial Code within the Florida Statutes.<sup>3</sup> Further, the law also amended, renumbered, and repealed parts of former chapter 674 of the Florida Statutes pertaining to bank deposits and collections ("amended chapter 674"),<sup>4</sup> as well as various other Florida Uniform Commercial Code sections. Because the revisions apply to transactions entered on or after January 1, 1993, no Florida appellate court as of the time this article was submitted had interpreted the revisions. Moreover, there were no amendments to the revised chapters during the 1993 Florida Legislative Session.

## II. BACKGROUND

The revisions to the Uniform Commercial Code were originally promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1990 for adoption by the various states to modernize the law of negotiable instruments.<sup>5</sup> The American Bar Association, as well as twenty-three states, including Florida, had approved the revisions by August 1993.<sup>6</sup>

Former Article 3 of the Uniform Commercial Code on commercial paper and former Article 4 on bank deposits and collections were both drafted in the early 1950s, and were written largely for a paper-based system. These former sections were essentially a revision of the Uniform Negotiable Instruments Law. In turn, the Uniform Negotiable Instruments Law was based primarily upon the British Bill of Exchange Act of 1882, which was a codification of case law from the eighteenth and nineteenth centuries. Thus, former Articles 3 and 4 were very old law in substance, and were created when business transactions were fewer in number and often conducted on a face-to-face basis. No major revisions of either

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2. FLA. STAT. §§ 673.101-673.805 (Supp. 1992) (repealed existing sections and created new sections within, designated parts to, and retitled Florida Statutes, chapter 673).

3. *Id.*

4. *Id.* §§ 674.101-674.504; chapter 674 incorporates Revised Article 4 of the Uniform Commercial Code within the Florida Statutes.

5. U.C.C. § 3 (1990).

6. States that have enacted the Article 3 and 4 Uniform Commercial Code Revisions as of the date this article was submitted include: Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, Washington, and Wyoming.

articles have been undertaken since their inceptions. Changes in technology, in business and financial practices, in federal responses to the consumer protection movement, and in interpretive ambiguities in the various sections of the existing law have created difficulties in the application of the original code. The revisions do not radically change the basic rules of negotiable instruments law contained in former Articles 3 and 4, but do modify that law in several significant respects. The revisions attempt to make the substance of both Article 3 and 4 more relevant to the way in which business is done today.

For example, former chapter 674 was prepared at the beginning of the automated processing for the collection of checks. As a result, banks and other institutions faced many problems that did not have clear answers under Florida law. An example is the Magnetic Ink Character Recognition ("MICR") process which is now in universal use. In this process, a check's face amount is magnetically encoded so that it can be "read" by a computer. Often, banks were precluded from recovery if they made an error in the encoding processing. Revised chapter 674 accommodates the realities of the automated processing system to provide for encoding warranties to give banks a basis for recovery, and takes into account check truncation<sup>7</sup> in its scheme for distributing rights and liabilities.

The revisions also attempt to clarify the language and rules by removing ambiguous and confusing language found in former Article 3. An example is the deletion of the phrase "with whom the holder has not dealt" in section 673.3051(2) of the Florida Statutes which states the defenses of any party to the instrument from which a holder in due course took free.<sup>8</sup>

Federal law, in some instances, preempts revised chapter 674 of the Florida Statutes. For example, the Competitive Equality Banking Act of 1987,<sup>9</sup> and Regulation CC,<sup>10</sup> control all aspects of the check collection system and supersede many state law check collection provisions.

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7. Check truncation refers to the process of check collection whereby items are not physically returned to the payor bank from the collecting bank.

8. FLA. STAT. § 673.3051(2) (Supp. 1992).

9. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 60, 101 Stat. 552, 635 (1987) (codified as amended at 12 U.S.C. § 4007 (1988)).

10. Regulation CC of the Board of Governors of the Federal Reserve System, located at 12 C.F.R. § 229 (1990), implements the Expedited Funds Availability Act. The Expedited Funds Availability Act was passed by Congress in 1987 and is designed to limit the hold periods depository banks can impose on customer accounts with respect to checks deposited in those accounts and grants the Federal Reserve Board extensive regulatory powers over any aspect of the payment system. See FLA. STAT. § 673.3051(2) (Supp. 1992).

This article addresses the revisions' impact on Florida law, and briefly discusses various details of their provisions and underlying policy.

### III. SCOPE AND COVERAGE OF REVISIONS

Both former and revised chapter 673 cover negotiable instruments. The former chapter had no provision stating its scope, while revised chapter 673 affirmatively states that it applies to "negotiable instruments."<sup>11</sup> Although they have many forms, there are only two types of negotiable instruments: drafts,<sup>12</sup> which include checks, and notes,<sup>13</sup> which include certificates of deposit.<sup>14</sup> One of the aims that the drafters hoped to accomplish was to recognize that notes and drafts have different functions meriting different treatment.

Nearly all of the instruments that were negotiable remain negotiable under revised chapter 673, thus allowing the transferee of the negotiable instrument to become a holder in due course.<sup>15</sup> However, a few items that were not negotiable under the former chapter will become so under the

11. FLA. STAT. § 673.1021(1) (Supp. 1992). The chief effect of an instrument being negotiable is that one who takes such paper for value, in good faith, and without notice that it is overdue, or contains an unauthorized signature or has been altered or that there is a claim or defense, becomes the owner of the paper free of the defenses and equities that exist between the original parties to the contract.

12. *Id.* § 673.1041(5). Comment 4 of this section provides that a "draft is an instrument that is an order." FLA. STAT. ANN. § 673.1041 cmt. 4 (West Supp. 1993). An "order" is defined in section 673.1031(1)(f) (Supp. 1992).

13. FLA. STAT. § 673.1041(5) (Supp. 1992). Comment 4 of this section provides that "a note is an instrument that is a promise." FLA. STAT. ANN. § 673.1041 cmt. 4 (West Supp. 1993). The statute also defines the term "promise." FLA. STAT. § 673.1031(1)(i) (Supp. 1992).

14. FLA. STAT. § 673.1041(10) (Supp. 1992).

15. *Id.* § 673.3021. To become a holder in due course under section 673.3021 a party must meet a two-pronged requirement. First, an instrument, when issued or negotiated to the holder, must not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete so as to call it into question. Second, the holder must take the instrument for value, in good faith, and without notice of four matters: (a) that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (b) that the instrument contains an unauthorized signature or has been altered; (c) of any claim to the instrument described in section 673.3061 (which includes a right to rescind a negotiation); and (4) that any party has a defense or claim in recoupment described in section 673.3051(1). *Id.* A holder in due course is a super-plaintiff who takes the negotiable instrument free of most of the ordinary contract defenses and claims to that instrument. *See id.*

revision. In recent years, lenders have used notes containing variable interest rates to evidence their loans. Courts have held that these notes are not negotiable instruments because such notes are not considered to contain an unconditional promise to pay a sum certain, which is required in order for former chapter 673 to apply.<sup>16</sup> As a result, banks and other holders of such instruments discovered that they could be subject to defenses to payment arising out of the transaction that generated the note, and about which the bank may know little. The revised section rejects this approach and allows variable interest rate notes to be considered promises to pay a sum certain and therefore negotiable.<sup>17</sup> Under revised chapter 673 the requirement of a "fixed amount of money" applies only to the principal amount.<sup>18</sup>

Under the former law, if a check lacked words of negotiability such as "order" or "bearer," there could be no holder in due course. Under the revision, the definition of a check deletes the provisions that it must be payable to "bearer" or to "order" and thus checks that omit words of negotiability are treated as fully negotiable.<sup>19</sup> The rationale for this change is that it is good policy to treat checks, which are payment instruments, as negotiable instruments whether or not they contain words of negotiability, especially since these words are almost always preprinted on the check form.<sup>20</sup> All other instruments, however, require words of negotiability.

Ordinary money orders now are classified in the revision as checks rather than bank obligations, so as to preserve the right to stop payment if the instrument is lost or there is a problem in the transaction.<sup>21</sup> Therefore, in Florida, ordinary money orders are subject to dishonor, overruling *Unger v. NCNB National Bank*.<sup>22</sup> Further, revised Florida Statutes, section 673.4111 improves the acceptability of bank obligations like cashier's checks and teller's checks<sup>23</sup> as cash equivalents by discouraging wrongful dishonor of these items. Subsection three provides that if an obligated bank wrongfully refuses to pay, it may be liable for consequential damages.<sup>24</sup>

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16. Doyle v. Trinity Sav. & Loan Ass'n, 869 F.2d 558 (10th Cir. 1989).

17. FLA. STAT. §§ 673.1121, 673.1041 (Supp. 1992).

18. FLA. STAT. ANN. § 673.1121(1) cmt. 1. (West Supp. 1993).

19. FLA. STAT. § 673.1041(4) (Supp. 1992).

20. FLA. STAT. ANN. § 673.1041(2) cmt. 2. (West Supp. 1993).

21. FLA. STAT. § 673.1041(6) (Supp. 1992).

22. 540 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1989) (money orders are akin to cashier's checks and not subject to dishonor).

23. Section 673.1041(8), Florida Statutes defines a "teller's check" as a draft drawn by a bank and is usually drawn on another bank. FLA. STAT. § 673.1041(8) (Supp. 1992).

24. *Id.* § 673.4111(3).

One of the most important changes from existing law under revised section 673.1041 is that all non-negotiable instruments (other than checks) are excluded from chapter 673.<sup>25</sup> Thus, a promise or order (other than a check) which includes a conspicuous statement that it is not negotiable or is not covered by chapter 673 will be excluded from this chapter. However, the official comments to revised section 673.1041 provide that parties to an instrument that are not included in chapter 673 may agree to apply its rules to their contract.<sup>26</sup>

### A. *Definitional Changes*

The revisions make several significant changes in definitions. The first is “good faith.” Under former law, “good faith” was defined as “honesty in fact in the conduct or transaction concerned.”<sup>27</sup> Revised chapter 673 redefines it, for both chapters 673 and 674 purposes, to include both honesty in fact and the observance of reasonable commercial standards of fair dealing.<sup>28</sup> The latter phrase refers to the fairness of conduct, not the care with which an act is performed.<sup>29</sup> Thus, the so-called pure heart, empty head test doctrine is displaced. The change brings the chapter 673 definition in accord with the prevailing standard under chapter 672—Sales with respect to merchants, which prevails in Article 2A—Leases, and which has been incorporated in Article 4A—Funds Transfers. The drafters provide no guidance for interpreting fairness of conduct or what might constitute reasonable commercial standards.

The definition of “ordinary care” is another change in the revisions. It is defined in amended chapter 674, without substantive change from former chapter 674, and is further defined in revised chapter 673 (and applicable to amended chapter 674) to mean

in the case of a person engaged in business, . . . observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and

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25. *Id.* § 673.102(1).

26. FLA. STAT. § 673.1041 cmt. 2 (West Supp. 1993).

27. FLA. STAT. § 671.201(19) (1991).

28. FLA. STAT. §§ 673.1031(1)(d), 674.104(3) (Supp. 1992).

29. FLA. STAT. ANN. § 673.1031 cmt. 4. (West Supp. 1993).

the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 674.<sup>30</sup>

The latter phrase attempts to facilitate the automated processing of checks on a risk/benefit analysis, that is, it does not require signature review until the point at or just before which it is economically prudent to do so. Further, the revisions make the issue of ordinary care one of fact.

The definition of "bank" for purposes of chapters 673 and 674 is expanded to include savings banks, savings and loans associations, credit unions, and trust companies.<sup>31</sup> The question of whether an institution is or is not a "bank" is an important one because it determines whether the institution is subject to the provisions of chapter 674. The aforementioned institutions had been omitted from the definition of a bank in the past because they had not been permitted to offer checking services and thus did not qualify under state or federal banking law as a bank. However, as a consequence of recent federal legislation, savings and loan associations, and other institutions are now engaged in the check collection process much like traditional banks. Moreover, with this new expanded definition of "bank," chapter 674 now conforms to Regulation CC<sup>32</sup> which includes these institutions within the definition of banks.

#### IV. ACCORD AND SATISFACTION

Accord and satisfaction deals with an informal method of dispute resolution carried out by use of a negotiable instrument. In the typical case, there is a dispute concerning the amount that is owed on a claim. For example, if the drawer<sup>33</sup> includes a legend on an instrument stating that payment of the check constitutes full satisfaction of the underlying obligation, the payee<sup>34</sup> runs the risk that the drawer's obligation will be satisfied if it voluntarily cashes or presents the check and is paid. Many payees attempted to legend their indorsement with the words "reservation of rights" or "under protest" or "without prejudice" in an effort to counter the

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30. FLA. STAT. § 673.1031(g) (Supp. 1992).

31. *Id.* §§ 673.1031(3), 674.104(2), 674.105(1); FLA. STAT. ANN. § 673.1031 cmt. 4 (West Supp. 1993).

32. 12 C.F.R. § 229.2(E)(4), (5) (Supp. 1990).

33. A drawer is defined in section 673.1031(1)(c), as "a person who signs or is identified in a draft as a person ordering payment." FLA. STAT. § 673.1031(1)(c) (Supp. 1992).

34. The payee is the person to whom a draft or note is made payable.



drawer's "full payment" legend. Because the former law did not include specific language concerning accord and satisfaction, there was an enormous amount of confusion and litigation regarding the "full payment" checks. Many courts relied on the common law to hold that if the payee cashed the check, the consumer's obligation was satisfied. However, some courts have held that the language of former UCC section 1-207 supports the payee's argument that the debt was not discharged if the payee indicated he or she had taken the instrument under protest. Florida courts were split on this issue.<sup>35</sup> Now, the revisions clarify the rules pertaining to accord and satisfaction.

First, as part of the revision of chapter 673, revised section 671.207 has been amended to add subsection two which provides that section 671.207 "does not apply to an accord and satisfaction."<sup>36</sup> Second, the revisions add a section entitled "Accord and satisfaction by use of instrument."<sup>37</sup> This section contains provisions concerning satisfaction of disputed claims through tendering of "instruments." It sets out the specific requirements that must be met for payment of an instrument to constitute accord and satisfaction.<sup>38</sup> Thus, if the person seeking the accord and satisfaction proves that the requirements of subsection (a) are met and the "conspicuous" statements are given, the claim is discharged unless revised section 673.3111(3) applies. This subsection is intended to address the problems faced by entities that receive and process a large number of checks.<sup>39</sup> Under subsection three such entities can avoid an inadvertent accord and satisfaction if they both notify the debtor that any full satisfaction check must be sent to a designated location, and are able to prove the instrument in question was not sent to that location.

## V. SIGNATURES BY AGENTS

Under former law, if an agent failed to sign a note in a manner that fully disclosed both his representative capacity and the name of his principal, the agent could personally be liable even though the principal was not. The former law provided that no person is liable on an instrument

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35. See *Eder v. Yvette B. Gervy Interiors, Inc.*, 407 So. 2d 312 (Fla. 4th Dist. Ct. App. 1981); *Miller v. Jung*, 361 So. 2d 788 (Fla. 2d Dist. Ct. App. 1978).

36. FLA. STAT. § 671.207(2) (Supp. 1992).

37. *Id.* § 673.3111.

38. *Id.* § 673.3111(1), (2).

39. *Id.* § 673.3111(3).

unless his or her signature appeared,<sup>40</sup> which had been interpreted to mean that an undisclosed principal was not liable on a negotiable instrument.<sup>41</sup> This was an exception to the general principle of agency law that binds an undisclosed principal on a contract.<sup>42</sup> Revised section 673.4021 returns to general agency principles and states that “the represented person would be bound if the signature were on a simple contract.”<sup>43</sup> However, under 673.4021(2)(b) of this section, both the agent and the principal are liable on such an instrument to a holder in due course that took the instrument without notice that the agent was not intended to be liable on the instrument.<sup>44</sup>

Subsection three, however, changes the law and provides that an agent who has signed an instrument without adequate indication of representative status may show that the parties did not intend individual liability.<sup>45</sup> This rule is not effective against a holder in due course. Moreover, under subsection three, an authorized representative will not be personally liable, even if the signature does not indicate agency status as long as the check is drawn on the corporate account and the corporation is identified on the check.<sup>46</sup> Therefore, in Florida, the agent does not have to disclose his or her capacity on a preprinted check bearing the principal’s name to avoid liability. Section 673.4031(2) makes it clear that a signature of an organization is considered unauthorized if more than one signature is required and a signature is missing.<sup>47</sup>

## VI. ALLOCATION OF LOSS

### A. *Comparative Negligence Standard is Adopted*

A major issue in negotiable instruments law is the proper balance between imposing loss on the employer, drawer or maker, and imposing loss on third parties, including payor or depositary banks, for theft, forgery, and unauthorized signatures. Much of the former statute’s common theme was to allocate the loss to the party that was in the best position to avoid the

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40. FLA. STAT. § 673.401 (1991).

41. FLA. STAT. ANN. § 673.4021 cmt. 1 (West Supp. 1993).

42. *Id.*

43. *Id.*

44. *Id.* § 673.4021(2)(b).

45. *Id.* § 673.4021(3).

46. FLA. STAT. ANN. § 673.4021(3) (West Supp. 1993).

47. *Id.* § 673.4031(2).

loss. However, determining which party is in the best position to prevent the loss was a difficult and uncertain process, especially in complex fact-sensitive settings. As a result, no provisions of the former law were more heavily litigated than the fraud allocation rules, particularly with respect to forged drawer's signatures and forged indorsements. The revisions adopt a balancing rationale to allocating loss. All parties in the payment and collection process have a responsibility to exercise ordinary care. Failure by any party to fulfill that responsibility should result in that party bearing an appropriate share of the resulting loss. For instance, under the former code, a payor bank, which in good faith paid a forged check, could shift the loss to the customer if the customer's "negligence" substantially contributed to the forgery, unless the bank was contributorily negligent.<sup>48</sup>

The prior negligence preclusion rule, now phrased in terms of failure to exercise ordinary care, is continued in revised section 673.406(1). However, contrary to the prior rule stated above, the negligence of a bank will not prevent it from asserting the negligence of the customer that substantially contributed to a forged signature or to an alteration. In the case where both the bank's customer and the bank are negligent, the loss will be allocated proportionately according to the degree of failure of each to exercise ordinary care.<sup>49</sup> The intent of the drafters in moving to this comparative fault is that it will reduce litigation and settlements will be encouraged by parties who realize that the jury may find both the customer and bank are both to blame in allowing the malefactor to succeed in his or her wrongdoing.

### B. *Fraudulent Indorsements Made by Employees*

Another policy issue that was unclear under the former statute is the extent to which an employer, rather than a depository or payor bank, should bear the loss caused by a dishonest employee who misappropriates negotiable instruments payable to, or drawn by, the employer. The revision imposes more responsibility on the employer for employee wrongdoing than former chapter 673. Former section 673.405 dealt only with certain limited frauds practiced by dishonest employees of drawers. The former section did not specifically address a situation where the malefactor is an employee not of the drawer but instead, is employed by the payee.<sup>50</sup> Fraudulent indorsements by an employee of the payee are now effective under the revisions

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48. FLA. STAT. § 673.406 (1991).

49. FLA. STAT. ANN. § 673.406(2) (West Supp. 1993).

50. FLA. STAT. § 673.405 (1991).

against the payee as long as the employee had the requisite responsibility with respect to the instrument. Revised section 673.4051, titled "Employer's responsibility for fraudulent indorsement by employee," adopts the principle that the risk of loss for "responsible" employee fraud in connection with the employer's checks should fall on the employer, because "the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged endorsement on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer."<sup>51</sup>

Under this new statute, the loss is shifted to employers by making the endorsement of the employer's name effective if made by an employee "entrusted . . . with responsibility with respect to the instrument."<sup>52</sup> The term "responsibility" is defined to include the authority to sign or indorse instruments, to process instruments received, to process or prepare instruments to be issued, to supply names or address of payees, to control the disposition of instruments or to act in a responsible capacity.<sup>53</sup> Thus, if an employee, who has authority to process incoming checks for bookkeeping purposes, steals a check, forges his or her employer's endorsement, and absconds with the proceeds, the employer is per se negligent and assigned the loss because it has been defrauded by a "responsible employee." However, the revised statute allows the employer to "shift the loss to the bank" to the extent the bank's failure to use ordinary care contributed to the loss.<sup>54</sup>

### C. *Direct Suits on Forged Indorsements*

Revised section 673.4201 clarifies several issues with respect to a forged indorsement. Under the former law, the owner of a check was denied the right to hold a depository bank liable for conversion when it collected a check with a forged indorsement and paid the proceeds to a person not entitled to them.<sup>55</sup> The revised section changes the law in this area by permitting the owner of an instrument to proceed in a direct action against either the depository or payor bank on a forged indorsement.<sup>56</sup> Thus, this section eliminates the requirement that the owner of the check

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51. FLA. STAT. ANN. § 673.4051 cmt. 1. (West Supp. 1993).

52. FLA. STAT. § 673.4051(2) (Supp. 1992).

53. *Id.* § 673.4051(1)(c).

54. *Id.* § 673.4051(2).

55. FLA. STAT. § 673.419 (1991); *Knesz v. Central Jersey Bank & Trust Co.*, 477 A.2d 806 (N.J. 1984).

56. FLA. STAT. § 673.4201 (Supp. 1992).

bring multiple actions against the various payor banks and that those banks then assert warranty rights against the depository bank.<sup>57</sup>

However, a depository bank is not subject to a direct suit by a drawer on a forged indorsement. Under former law the courts were divided on whether the drawer of a check with a forged indorsement could assert rights against a depository bank that took the check.<sup>58</sup> Revised section 673.4201(1)(a) resolves the conflict by providing that the drawer of a check cannot sue the depository bank in conversion, since the check represents the obligation of the drawer rather than the drawer's property.<sup>59</sup> The drawer retains its remedy against the payor bank for recredit of the drawer's account based on unauthorized payment.<sup>60</sup>

Moreover, the revised section clarifies the rights of the payee in a situation in which a thief steals or obtains possession of an instrument in an unauthorized manner and forges the payee's indorsement so the thief can obtain payment at a depository or drawee bank.<sup>61</sup> Section 673.4201(1)(b) provides that a payee who did not receive either direct delivery of the instrument or indirect delivery through an agent or co-payee may not bring an action for conversion. The rationale behind this is that until the payee has possession of the instrument, the instrument does not belong to the payee such that a conversion action is proper.<sup>62</sup>

## VII. CUSTOMER'S DUTY TO DISCOVER UNAUTHORIZED SIGNATURE OR ALTERATION

Revised section 674.406 extends duties to customers to examine their bank statements and to promptly report reasonably discoverable unauthorized signatures or alterations.<sup>63</sup> Under former section 674.406, a bank normally sent its customers the statement of account accompanied by a paid or canceled check.<sup>64</sup> After the bank made the statement and the checks available, the customers had a duty to discover any unauthorized signature

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57. *See id.*

58. *Compare* Jett v. Lewis State Bank, 277 So. 2d 37 (Fla. 1st Dist. Ct. App. 1973) (drawer has no basis for suit) *with* Wymore State Bank v. Johnson Int'l Co., 873 F.2d 1082 (8th Cir. 1989) (drawer may sue).

59. *See* FLA. STAT. § 673.4201(1)(a) (Supp. 1992).

60. *See id.* § 673.4201(3).

61. *See id.* § 673.4201(1)(b).

62. FLA. STAT. ANN. § 673.4201 cmt. 1. (West Supp. 1993).

63. FLA. STAT. § 674.406(3) (Supp. 1992).

64. *See* FLA. STAT. § 674.406(1) (1991).

or alteration and promptly notify the bank of this discovery.<sup>65</sup> To facilitate truncation and the existing state of technology, revised section 674.406 extends to the customer the responsibility to discover alterations and unauthorized signatures even when the customer only receives the statement and not the checks.<sup>66</sup> However, the statement must contain “sufficient information” to allow the customer to reasonably identify the items paid.<sup>67</sup> “Sufficient information” can be as little as information concerning the item number, amount, and date of payment.<sup>68</sup> Thus, under this revised definition, a bank is not required to provide the customer with the name of the payee or the date the check was written. While this rule may appear fair on its face and may result in reduced processing costs for the bank, consumers may suffer. Many consumers do not keep meticulous records; if the consumer receives only the check number, amount, and date of payment, it may be difficult to determine whether a check has been misdirected to an improper payee or has been altered.

Revised section 674.406 changes the allocation of loss between the parties.<sup>69</sup> Under former section 674.406, customers could be held responsible for an unauthorized signature if they failed to promptly examine the statement and checks, and such failure to examine and notify caused the loss.<sup>70</sup> Under the former section, the customer would not be responsible if the customer successfully established that the bank failed to exercise ordinary care in paying the check.<sup>71</sup> Under the revised Florida Uniform Commercial Code, if the customer fails to promptly notify the bank of “relevant facts,” the customer not only must prove the bank failed to exercise ordinary care, but he or she also must prove that “the failure substantially contributed to the loss.”<sup>72</sup> Even if the customer provides the necessary proof, the bank may not bear the entire loss because revised section 674.406(5) provides a comparative negligence test for allocating loss between the customer and bank.<sup>73</sup> However, this subsection also provides that if the customer proves the bank did not pay the check in good faith, the

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65. *Id.*

66. FLA. STAT. § 674.406(3) (Supp. 1992).

67. *Id.* § 674.406(1).

68. *Id.*

69. *See id.* § 674.406(4), (5).

70. FLA. STAT. § 674.406(2) (1991).

71. *Id.* § 674.406(3).

72. FLA. STAT. § 674.406(5) (Supp. 1992).

73. *Id.*

preclusion does not apply, and the customer may demand that the bank credit his or her account.<sup>74</sup>

The new definitions of good faith and ordinary care may also prove a major change in the operation of this section.<sup>75</sup> Under former law, good faith was defined as “honesty in fact.”<sup>76</sup> The definition of “good faith” is expanded under revised section 673.1031(1)(d) to require both honesty in fact and “observance of reasonable commercial standards of fair dealing.”<sup>77</sup> The official comment to revised section 673.1031 attempts to clarify the meaning of observance of reasonable commercial standards of fair dealing by expressing concern for fairness of conduct rather than the care with which an act is performed.<sup>78</sup> One must determine fair dealing “in light of reasonable commercial standards.”<sup>79</sup> The drafters provide no guidance for interpreting fairness of conduct or what might constitute reasonable commercial standards. This new definition of good faith, however, should impose a higher duty upon banks, and should benefit consumers by making it clear that banks have an obligation to observe objective standards of fairness and commercial reasonableness in handling consumer accounts.

The term “ordinary care” used in the revision specifically provides that sight examination by a payor bank is not required if its procedure is reasonable and is commonly followed by other comparable banks in the area.<sup>80</sup> The official comment states the intent is to reject those cases that hold failure to use sight reviews constitutes lack of ordinary care as a matter of law.<sup>81</sup> Therefore, this new provision for ordinary care under section 674.406 should benefit banks because the determination of whether a bank has failed to exercise ordinary care will now be left to the jury who will measure the bank’s conduct against what its peers do in its market area.<sup>82</sup> This section also increases the maximum time from fourteen days to thirty days for a customer to report successive forgeries or alterations.<sup>83</sup> Further, revised section 674.406(2) states a new rule whereby a bank truncating

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74. *Id.* § 674.406(5).

75. *Id.* § 673.1031(1)(d).

76. *See* FLA. STAT. § 671.201(19) (1991).

77. FLA. STAT. § 673.1031(1)(d) (Supp. 1992).

78. FLA. STAT. ANN. § 673.1031 cmt. 4 (West Supp. 1993).

79. *Id.*

80. FLA. STAT. § 673.1031(1)(g) (Supp. 1992).

81. FLA. STAT. ANN. § 673.1031 cmt. 4 (West Supp. 1993).

82. *See* FLA. STAT. § 674.406 (Supp. 1992).

83. *Id.* § 674.406(4)(b).

checks must retain the item or have the capacity to furnish legible copies for seven years.<sup>84</sup>

### VIII. CONCLUSION

The amendments to Florida Statutes, chapters 673 and 674 should lower costs to banks by providing for modern technologies such as check truncation and automated processing. Further, the amendments should help provide certainty for the financial community and its users by removing the numerous ambiguities that existed in the former provisions. Moreover, by clarification of troublesome issues, and by the provisions of sections 673.4041 to 673.4061, which reform rules for allocation of loss from forgeries and alterations, the revisions should reduce litigation. Consumers receive some added protections and benefits from the revisions, including an expanded statutory obligation for banks to act in good faith. However, consumers will now be confronted with extra duties placed on them in connection with unauthorized signatures or alterations of checks.

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84. *Id.* § 674.406(2).